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Nos. 426 to 441 inc.

In the Supreme Court of the United States

OCTOBER TERM, 1930

B. D. McCAUGHN, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

B. D. McCAUGHN, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, *v.* KLEIN CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* KLEIN CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* KLEIN CHOCOLATE CO.

B. D. McCAUGHN, COLLECTOR, *v.* KLEIN CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* WILBUR-SUCHARD CHOCOLATE CO.

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B. D. McCAUGHN, COLLECTOR, *v.* WILBUR-SUCHARD CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, *v.* YORK CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* YORK CHOCOLATE CO.

B. D. McCAUGHN, COLLECTOR, *v.* YORK CHOCOLATE CO.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

October Term, 1930

No. —

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No. —

Est. E. Lederer, Collector, *v.* Hershey Chocolate Co.

No. —

Est. B. F. Davis, Collector, *v.* Hershey Chocolate Co.

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B. D. McCaughn, Collector, *v.* York Chocolate Co.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the petitioners, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Third Circuit entered in the sixteen cases on June 6, 1930, between the above-named parties, which cases were docketed as Nos. 4157, 4158, 4159, 4160, 4161, 4162, 4163, 4164, 4165, 4166, 4167, 4168, 4169, 4170, 4171, and 4172, October Term, 1929, in said court and which judgments reversed the judgments of the District Court of the United States for the Eastern District of Pennsylvania.

STATEMENT

Respondents brought suits in the United States District Court for the Eastern District of Pennsylvania to recover amounts paid as excise taxes on "candy" under the provisions of Title IX, Section 900 (9), of the Revenue Act of 1918, and Title IX, Section 900 (6) of the Revenue Act of 1921, on the sale by respondents of sweet chocolate and sweet milk chocolate in various forms and sizes. The taxes were paid monthly over a period of years. Since different individuals held the office of Collector of Internal Revenue during the period involved, sixteen separate suits were filed by respondents. Written stipulations waiving a jury were

filed. (R. 3–16. All references are to the record in the case docketed in the Circuit Court of Appeals as No. 4157, *Hershey Chocolate Company* v. *McCaughn*.)

The District Court made special findings of fact and conclusions of law, holding as a conclusion of law that the sweet chocolate and sweet milk chocolate manufactured and sold by respondents were "candy" within the meaning of the applicable statutes. (R. 27.) Statements of fact in its opinion which the court adopted as findings of fact included the following (R. 27, 33):

> The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. * * * One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. * * *

Upon appeal the judgments were reversed by the Circuit Court of Appeals for the Third Circuit, which held that the collection of the taxes upon the products of respondents was not authorized. (R. 154.)

The sixteen cases were tried together in the District Court and there was but one argument in the Circuit Court of Appeals, and each court decided all of the cases in a single opinion. (R. 32, 147–148.) By stipulation of the parties filed in the Circuit Court of Appeals in twelve of the cases it was agreed that the decisions in those twelve cases should be controlled by and conform to the ultimate decisions in Nos. 4157, 4166, 4169, and 4172. Separate printed records have been prepared and filed in those four cases only, but these four records are records for all sixteen cases. (See, for example, R. 154.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the excise taxes imposed by Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 upon "candy" sold by the manufacturer were not applicable to the sweet chocolate and sweet milk chocolate manufactured and sold by respondents in various forms and sizes.

(2) In holding that the regulations promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, classifying sweet chocolate and sweet milk chocolate as "candy" within the meaning of those sections of those Acts, were unauthorized by law.

(3) In holding that respondents were entitled to recover the excise taxes paid by reason of the manu-

facture and sale of sweet chocolate and sweet milk chocolate in various forms and sizes.

REASONS FOR GRANTING THE WRITS

(1) The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Malley* v. *Walter Baker & Co.*, 281 Fed. 41, wherein it was held that sweet chocolate is "candy" within the meaning of Section 900 of the Revenue Act of 1918, imposing excise taxes.

(2) The Circuit Court of Appeals has held invalid regulations of long standing under which the liability of many other taxpayers has been determined. This holding is in direct conflict with the holding in the *Baker case* (281 Fed. 41, 46), and is also inconsistent with the holding in *Cracker Jack Co.* v. *United States*, 67 C. Cls. 89, 96 (certiorari denied, 280 U. S. 579), in which the Court of Claims upheld the regulation as applied to certain coated popcorn products. The holding of the Circuit Court of Appeals failed to apply the principle that the reenactment in a later Act of the provision construed by the Department is "persuasive evidence of legislative approval of the regulation," enunciated and applied by this Court in *Brewster* v. *Gage*, 280 U. S. 327, 337, and other cases there cited.

(3) The Circuit Court of Appeals has rejected the consistent Departmental construction of the statute, in spite of the rule that such construction

should not be disturbed except for weighty reasons. *Brewster* v. *Gage*, 280 U. S. 327, 336, and cases there cited.

(4) Other cases involving the same question are now pending in the courts and a final decision by this Court will establish a rule for the settlement of those cases.

(5) The sixteen instant cases involve amounts aggregating about $8,000,000 and justify the consideration of this Court despite the fact that the excise tax was repealed by Section 1100 of the Revenue Act of 1924.

Wherefore it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals for the Third Circuit should be granted.

THOMAS D. THACHER,
Solicitor General.

SEPTEMBER, 1930.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The final opinion of the District Court for the Eastern District of Pennsylvania (R. 32) and the opinion of the Circuit Court of Appeals (R. 148) are unreported.

JURISDICTION

The judgments of the United States Circuit Court of Appeals were entered on June 6, 1930. (R. 154.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The sole question is whether the excise taxes imposed by Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 on the sale by the manufacturer of "candy" are applicable to sweet chocolate and sweet milk chocolate in blocks, bars, and small pieces, suitable for consumption, sold to be retailed in candy and other stores.

STATUTES AND REGULATIONS INVOLVED

These are printed in the Appendix, pp. 13–18, *infra*.

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STATEMENT

A statement of the facts and the errors relied on will be found in the petition.

ARGUMENT

The primary purpose of the pertinent statutes was to lay excise taxes upon the sale of luxuries as distinguished from necessities. *Malley* v. *Walter Baker & Co.*, 281 Fed. 41, 45; *Cracker Jack Co.* v. *United States*, 67 C. Cls. 89, 97. The regulations promulgated by the Commissioner of Internal Revenue gave recognition to this limited scope of the statutes by excluding from the operation of the tax "bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste." (Regulations 47, Article 22, approved May 1, 1919, p. 14, *infra*.) This regulation was revised in December, 1920 (pp. 15–16, *infra*), so as to exclude from the operation of the tax "cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in

which it is then sold." It is conceded that the products as to which the taxes in question were paid do not come within the foregoing excluded classes. (R. 83.)

The evidence shows that sweet chocolate of the kind upon which the taxes were paid is commonly sold by candy wholesalers to be retailed in candy stores, as well as in drug stores, grocery stores, and cigar stores; that it is sold in the candy departments of department stores; that it is wrapped and sold in attractive packages in bars, blocks, and small pieces of various sizes and shapes (sometimes containing nuts); that such packages were given names which would appeal to candy consumers (R. 33, 81–96); and that one of the respondent's labels and advertising matter described its product as a "confection." (R. 23.) In holding that such products were excluded from the excise tax on "candy," we submit that the Circuit Court of Appeals has taken from the Act "a great deal of utility and makes [the statute] miss its purpose." *Cf. Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, 506.

The Revenue Act of 1918 imposed the tax upon the sale of "candy" by a manufacturer without attempting to define the term. Pursuant to statutory authority, the Commissioner of Internal Revenue promulgated the regulations which expressly included sweet chocolate of the kind here taxed (pp.

13-14, *infra*), and the Treasury Department has consistently applied the regulations and collected excise taxes upon the sales of such products.

The Circuit Court of Appeals rested its decision upon its conclusion that Congress intended to exclude such products from the excise taxes. The statutes themselves bear no evidence of any such intent but the Circuit Court of Appeals has given much weight to the fact that in earlier Tariff and Internal Revenue Acts candy, generally called "sugar candy," and chocolate have been separately classified. Because chocolate has been heretofore classified in Tariff Acts separately from candy the Circuit Court of Appeals holds that it must be presumed that when Congress taxed candy alone it intended to exclude chocolate. We submit that no such presumption should be indulged and that a classification otherwise appropriate should not be rejected merely because for other purposes Congress elected to tax chocolate products separately from other candy. The rule has been applied in the past in determining what rate of tax is applicable, but applying the rule in these cases results in altogether excluding sweet chocolate and sweet milk chocolate from the tax.

The Revenue Acts of 1918 and 1921 placed a luxury tax on "candy" and it should be borne in mind

that the products involved in these cases are not all kinds of sweet chocolate and sweet milk chocolate, but only sweet chocolate and sweet milk chocolate packed and offered for sale in packages of convenient size and form so that they might be readily consumed and that they were offered for sale in the places where the candy consumer customarily trades.

The regulations have been held valid as applied to sweet chocolate by the Circuit Court of Appeals for the First Circuit in *Malley* v. *Walter Baker & Co.*, 281 Fed. 41. In *Cracker Jack Co.* v. *United States*, 67 C. Cls. 89, the regulations were held valid as applied to certain commodities other than sweet chocolate, and this Court denied certiorari, 280 U. S. 579.

The Revenue Act of 1921 reenacted, without change except in rates, the excise tax on the sale of "candy" by the manufacturer while the regulations under the 1918 Act were in effect. As this Court has said in several cases, Congress, by reenactment without change of a statute which has received departmental construction, is considered to have adopted such construction. *United States* v. *G. Falk & Brother*, 204 U. S. 143, 152; *United States* v. *Hermanos y Compania*, 209 U. S. 337, 339; *National Lead Company* v. *United States*, 252 U. S. 140, 146.

CONCLUSION

In view of the foregoing it is respectfully submitted that writs of certiorari should be granted.

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SEPTEMBER, 1930.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, so far as material, is as follows:

> There shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> * * * * *
>
> (9) Candy, five per centum.

Section 900 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 291, contained a similar provision, the rate of tax being three per centum.

Section 1309 of the Revenue Act of 1918, 40 Stat. 1143, is as follows:

> That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.
>
> * * * * *

Section 1303 of the Revenue Act of 1921, 42 Stat. 309, is similar.

Article 22 of Regulations 47 of the Commissioner of Internal Revenue, "Relating to the Excise

Taxes on Sales by the Manufacturer," promulgated May 1, 1919, and approved by the Secretary of the Treasury, is as follows:

> Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glacé or candied fruits and nuts, popcorn and other cereals or cereal products mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, candy cough drops and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate whether plain or mixed with fruits or nuts; and all similar articles however designated. It does not include, however, cereal breakfast foods, cake and pastries, nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste. If a manufacturer of glacé or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto, showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which

he has bought from another manufacturer and on which he has performed no further process of manufacture the tax attaches only to such portion of the goods sold as have been manufactured by him.

Subsequently these regulations were revised in December, 1920, to read as follows:

ART. 22. *Candy.*—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolated-covered fruits and nuts, glacé or candied fruits and nuts not specified in paragraph (b) of this subdivision; popcorn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and chocolate-covered marshmallows; candy cough drops sold in bulk and without remedial claims (see art. 16, Regulations 51); sweetened licorice not taxed as cough drops under section 907; sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate

which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.

Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items.

Regulations 47, issued under the 1921 Act, provided:

ART. 19. *Candy.*—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gumdrops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or

candied fruits and nuts not specified in paragraph (b) of this subdivision; pop corn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies, plain and chocolate-covered marshmallows; candy cough drops sold in bulk and without remedial claims; sweetened licorice; sweet chocolate and sweet-milk chocolate, whether plain or mixed with fruit or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.

Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed sep-

arately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items.